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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

T.W. et al.,

Petitioners,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent;

LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Real Party in Interest.

No. B296216

(Super. Ct. No. 18CCJP01757A)

ORIGINAL PROCEEDING; petitions for extraordinary writ. Kim L. Nguyen, Judge. Writs granted in part and denied in part.

Los Angeles Dependency Lawyers, Law Office of Martin Lee, Bernadette Reyes, Amy McAllister, for Petitioner T.W.

Law Office of Marlene Furth, Nicole J. Johnson, Samantha Hart, for Petitioner R.J.

No appearance for Respondent.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, Navid Nakhjavani, Principal Deputy County Counsel, for Real Party in Interest Los Angeles County Department of Children and Family Services.

Children's Law Center, Kristin Hallak, for Minor E.J.

I.
INTRODUCTION

T.W. (mother) and R.J. (father) each filed a petition for extraordinary writ after the juvenile court exercised its authority to bypass reunification services. In doing so, the juvenile court concluded reunification services are not likely to prevent reabuse or continued neglect of the child, E.J., and that failure to attempt reunification would not be detrimental to E.J. Mother and father argue the findings were not supported by substantial evidence because the Los Angeles County Department of Children and Family Services (DCFS) did not properly investigate, assess, and advise the court of the parents' likelihood of success at reunifying with E.J. Mother also argues the juvenile court violated her due process rights by refusing to continue the hearing to allow her to testify. Father and mother contend the juvenile court failed to comply with notice provisions of the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.) with respect to father's claim of Indian ancestry. DCFS and E.J., through minor's counsel, argue the juvenile court properly denied reunification services and did not violate mother's due process rights, but concede the juvenile court must ensure compliance with ICWA. We grant in part the petitions for extraordinary writ and order the juvenile court to ensure compliance with ICWA. We find no abuse of discretion in the juvenile court's denial of reunification

services and no prejudice from the court's refusal to continue the matter for mother's testimony.

II.
FACTUAL AND PROCEDURAL BACKGROUND

A. E.J.'s Hospitalization and Detention from Parents

E.J. was born on January 2, 2018. When he was nine weeks old, on March 11, 2018, father rushed him to the emergency room at Valley Presbyterian Hospital in Van Nuys. Father thought E.J. was having a seizure. Suspecting E.J.'s symptoms were caused by "shaken baby" syndrome, hospital officials notified police and transferred E.J. to Children's Hospital Los Angeles (CHLA).

When police arrived at the hospital, they found father hovering over E.J., crying. Father said he woke up at about 7:00 a.m., made a bottle for E.J., fed him, and then placed him in a chair in front of the television while father got ready for work. When father walked back to check on E.J., the baby was screaming and shaking. Father picked up E.J., who looked lethargic. Father thought E.J. was having a seizure. Although E.J. had never had a seizure before, father was familiar with the condition because mother had seizures, as did father's 8-year-old child.

Father woke up mother and told her E.J. was having a seizure. Mother described E.J.'s eyes as half-open and said he was making a gurgling sound. Mother thought he felt like "dead weight." Mother told father to take E.J. to the

hospital. Father carried E.J. out of the room and walked to the hospital a block away.

Physicians at Valley Presbyterian Hospital diagnosed E.J. with brain hemorrhaging consistent with trauma caused by being severely shaken. There were no other visible signs of injury. Physicians at CHLA confirmed E.J. had a hemorrhage but no skull fracture. There were no signs of external injury on E.J.'s body. Additional imaging revealed "[b]ilateral holohemispheric supratentorial and infratentorial subdural hematomas with the left frontal subdural hematoma more chronic in nature . . . ." An "ophto [*sic*] exam" determined E.J. also had retinal hemorrhages typically seen with "shaken baby" syndrome. A neurosurgery consult report indicated that "non-accidental trauma" was suspected.

As for other possible explanations for E.J.'s injury, mother reported she fell twice during her pregnancy. Soon after giving birth to E.J., she fell asleep with E.J. in her arms and E.J. fell onto the floor. Hospital staff examined E.J. and found no injuries at the time. About two or three weeks before the incident, father forgot to latch E.J. into his car seat after he placed it on the floor to cook or go to the bathroom. E.J. slid onto the floor out of the bottom of the car seat and hit his head. Father said he picked the child up and he looked normal.

Mother confirmed she has petite, grand, and absence seizures. She sees a neurologist and was taken off her medication when she was pregnant with E.J. When asked

how she disciplines E.J., mother said, "He doesn't misbehave. He's 2 months old." If the child cries for no reason, she picks him up and talks to him.

On March 13, 2018, a judge granted a removal warrant to detain E.J. from mother and father, and E.J. was placed on a hospital hold. On March 16, 2018, DCFS filed a juvenile dependency petition under Welfare and Institutions Code section 300, subdivisions (a) (serious physical harm), (b) (failure to protect), and (e) (severe physical abuse of a child under age 5).[1] The petition recited E.J.'s medical injuries and alleged those injuries would not have happened but for the "deliberate, unreasonable and neglectful acts" of mother and father. It also alleged father's illicit drug use placed E.J. at risk of harm.

At the March 19, 2018 detention hearing, father filed an ICWA-020 form indicating he may have Cherokee ancestry and naming three relatives who may have additional information about the family's Native American heritage. The juvenile court ordered DCFS to investigate father's possible Native American ancestry, found father to be E.J.'s presumed father, and detained E.J. from both parents. E.J. was discharged from the hospital on March 22, 2018, and placed in foster care.

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

B. DCFS Investigation and Jurisdiction/Disposition Report

In anticipation of a hearing scheduled on May 8, 2018, DCFS filed a jurisdiction/disposition report on April 24, 2018. The dependency investigator reported she placed two calls to paternal grandmother (PGM) to inquire about the family's possible Native American ancestry, but was unable to reach PGM on either occasion.

The report also recounted mother and father's prior child welfare history. Including E.J., mother has four children and father has seven children. In August 2012, the juvenile court sustained a section 300 petition on behalf of mother's daughter, M.W., based on domestic violence by mother's then-boyfriend and mother's drug use. One week later, the juvenile court terminated jurisdiction with a family law order granting joint legal custody to the parents and sole physical custody to M.W.'s father. On April 25, 2014, DCFS received another referral, this time alleging M.W. was at risk of sexual abuse by her father. DCFS filed another section 300 petition on behalf of M.W. and her sister A.S. The juvenile court ultimately terminated parental rights and ordered permanent placement services for M.W. and A.S.

Father's child welfare history involves two referrals for physical abuse of his son, T.S. A November 2004 referral alleged father hit T.S., then 13 years old, on the mouth with his shoulder. A second referral in January 2006 alleged

father punched T.S. on the lip after he spent the night with friends without obtaining permission. Upon investigation, father said he hit T.S. with a belt but denied punching his son. T.S. refused to live with father, so the family made plans for him to live with his maternal grandmother. The referral was substantiated but closed because DCFS determined the situation had stabilized.

Father was convicted of domestic violence in 1996 and again arrested for domestic violence on June 24, 2017. According to mother, father was arrested after she fell in the shower while pregnant. She was upset that father never visited her in the hospital, so she refused to let father into the house after she went home. Father threatened to knock out a window with a hammer and a relative called law enforcement to resolve the dispute.

When asked about E.J.'s injuries, mother said she had certificates in the medical field, had done her research, and believed E.J.'s injuries stemmed from the three times he was dropped as an infant. The first occurred in the hospital, when she fell asleep and E.J. fell from her arms onto the floor. The second happened when E.J. was 24 days old. She was carrying E.J. in a car seat, but he was not buckled in. She swung the car seat as she walked. She said, "I could tell on the way back the car seat was lighter. I looked on the ground and there he was. His head was on the grass. He was half on the grass and half on the sidewalk." The third fall happened when he slid out of the car seat while father was cooking or in the bathroom.

The dependency investigator told mother that E.J.'s falls did not explain his injuries. Mother responded, "You['re] going to believe the doctors instead of me? I did my research. If the doctor told you the sky was purple you'd believe him?" Mother said other people had cared for E.J., including Anjileen S. and Lizette M. The dependency investigator was unable to reach either person for an interview.

Father, too, denied that anyone had shaken E.J. and insisted again that E.J. had a seizure. He acknowledged he is not home 24 hours a day but said mother would not shake the baby. Without prompting, father said, "I want my son back. I do understand that sometimes my practices as a parent is a little rough. I have boys. I am rough. I'm not making any excuses. That's the way I was raised. I know I'm rough. She tells me I'm rough. I know I need classes. I may have some issues with my anger but not to the extent I would hurt a kid. I want us to have our baby back whatever it takes. He's everything that is good. I have 7 kids. I feel like with all my kids, they have the good part of me. I'm not Al Capone but I have my issues. I would give up my life for him." Father admitted he used drugs in the past, but said he has not used any drugs since 2013.

A social worker scheduled a visit between mother and E.J. on April 9, 2018, but mother was an hour late and by the time she arrived, the visit had been cancelled and rescheduled. On April 11, 2018, the parents visited with E.J. separately. The social worker reported that mother

immediately took E.J. out of his car set and held him the entire visit. Mother talked to E.J. during the visit and cried when it was time to say good bye. Father, too, immediately reached out for the baby when he saw E.J. Father held E.J. and talked to him during the visit.

DCFS believed E.J. would not be safe under the care of either parent as it was unknown which parent caused the injury and whether one parent was protecting the other parent. Citing the parents' failure to provide a plausible explanation for E.J.'s injuries, mother's failure to reunify with children in the past, father's demonstrated propensity for violence and admitted anger issues, and the parents' history of drug use, DCFS recommended the juvenile court deny family reunification services pursuant to section 361.5, subdivision (b)(5).

C. Multidisciplinary Assessment Team (MAT)

The May 8, 2018 hearing was continued to May 29, 2018, for a trial setting conference. In a last-minute information filed on May 23, 2018, DCFS supplied the juvenile court with E.J.'s MAT report.

According to the report, mother had enrolled in online parenting and anger management classes, and was participating in a Narcotics Anonymous group as well as a support group for former prostitutes. The MAT team reported she was motivated and determined, an avid learner who enjoyed taking educational courses on a variety of subjects, and currently employed. It reported that father,

too, had enrolled in online parenting classes and had discussed plans to enroll in anger management classes in person. Father acknowledged needing parenting classes, admitted his anger issues, and recognized the impact of his own childhood experiences on his parenting practices.

The MAT report also discussed potential barriers to parents' reunification with E.J. It noted the parents appeared to be in denial as to what happened to E.J. and seemed to lack responsibility for their actions. The team noted both parents have child welfare histories, that mother has a history of crack cocaine abuse, and that both parents have refused to drug test. The MAT team recommended that mother and father address their personal issues, which were interfering with their ability to be fully available to E.J.

According to the report, E.J. had adjusted well to his new home environment with his foster mother. His foster mother described him as inquisitive and said he shows comfort and pleasure in being held. He makes sounds in response to voices and is learning to self-soothe by sucking his hand. Mother reported that E.J. becomes fussy and overstimulated when there is a lot of noise and pulls his hair out. Mother said these behaviors were present prior to his detention by DCFS. Foster mother, too, noted that E.J. pulls out his hair and that he tends to do so randomly throughout the day. The MAT report noted the effects of child abuse "may last a lifetime" and can include brain damage and hearing and vision loss. It concluded E.J. requires "[a] stable

and safe home environment and reassurance in knowing he can rely on his primary caregiver to meet all of his needs" to reach developmental milestones and form healthy, positive relationships later in life.

D. Further Hearings

At the May 29, 2018 hearing, mother's counsel brought up her client's wish to attend E.J.'s medical appointments. The court responded, "Yes, parents always have rights to attend medical appointments. It is incumbent upon the parents to attend those." Parents' counsel informed the court DCFS was limiting parents' visits with E.J. to once a week for two hours, despite the juvenile court's order that each parent be permitted a minimum of three visits a week for three hours each time. The juvenile court reiterated its visitation order, directed DCFS to provide a written visitation schedule, and indicated the parents could visit E.J. together.

The juvenile court subsequently continued the jurisdictional hearing several times to allow the parties to obtain expert witnesses.

E. Dr. Imagawa's Report

On August 7, 2018, DCFS filed a report by Dr. Karen Kay Imagawa, Chief of Staff at CHLA, Director of the CARES Center (CHLA's child protective program), and Director of Developmental and Behavioral Pediatric Program. Dr. Imagawa reviewed E.J.'s birth records, which

showed the child's birth by C-section was without complications or trauma. E.J. had no other medical records until his presentation at Valley Presbyterian Hospital. According to mother, he had not been seen by a pediatrician due to insurance issues. Dr. Imagawa opined that intracranial injuries such as the subdural hemorrhage "rare[ly]" result from causes other than trauma. Seizure activity, such as the one E.J. experienced, could occur any time after trauma or from subdural blood or cortical vein thrombosis. "Given the extent and distribution of [E.J.'s] retinal hemorrhages non-accidental/inflicted trauma (e.g., from vigorous shaking) is of primary concern." Dr. Imagawa believed E.J.'s seizure activity would not have caused such retinal hemorrhages. She explained the family had not reported any known history to adequately explain E.J.'s injuries. There were no underlying medical conditions or birth trauma to explain the injuries. She noted that while mother had reported dropping E.J. in the hospital, there were no records of such a fall or the child being examined by a nurse. And a partial fall out of the car seat, where the body was on the floor while the head remained in the car seat, would not explain E.J.'s injuries. Dr. Imagawa concluded, "Due to his significant traumatic head injury resulting in infraction and extensive retinal hemorrhages, [E.J.] is at risk for developmental delay, possible visual impairment, as well as being at risk of recurrent seizure activity. Close follow-up is recommended to include

Neurology, Ophthalmology; and Regional Center services to include physical and occupational therapy."

F. Last-Minute Information Reports

In a September 18, 2018 last-minute information, DCFS reported the parents visited E.J. on July 15, July 28, and August 4, 2018. It also reported that mother and father had not attended any of E.J.'s medical appointments. According to the social worker, "mom left a message [for foster mother] saying that she was sorry she missed the last doctors visit as she is not a morning person."

At a January 29, 2019 meeting, child social worker Teri Rubanowitz reported that father was not visiting E.J. and that mother visits "sporadically, maybe once or twice a month." While Rubanowitz monitored the case during the first two or three months, the parents visited three or four times. Both parents had fallen asleep while holding E.J. during the visits. Foster mother also reported that mother wanted to have a birthday party for E.J. at Chuck E. Cheese's, so foster mother agreed to meet her there. Mother was one hour late to the party. Also on January 29, 2019, Rubanowitz reported that the parents were not participating in any programs. Rubanowitz said mother had enrolled in parenting classes online, but when Rubanowitz told her she had to attend an in-person parenting class, mother said she could not do so because she experiences too much anxiety.

On January 31, 2019, the dependency investigator called father and mother to confirm their addresses so she

could be notified of an upcoming hearing. Mother said she did not know her address. Although she agreed to call back with her address, she never did. The investigator went to mother's last known address, at a motel, but the motel manager said mother had not lived there for "quite some time." The investigator then went to father's address and found mother there as well. DCFS surmised that mother and father were living together, despite mother's claims that she was no longer in a relationship with father and did not know where he lived.

G. Jurisdictional Hearing

The jurisdictional hearing took place on February 14, 2019, about 11 months after E.J. was detained from his parents.

Dr. Steven Gabaeff testified on behalf of parents. After voir dire, the juvenile court designated him an expert in child abuse medicine. Dr. Gabaeff believed E.J.'s injuries were caused by an infection and birth trauma. He noted that even a mild infection can cause the brain to swell slightly and cause a seizure. However, the proper tests were not done to determine whether an infection was present. For example, the hospitals never tested for herpes, which is the most common cause of viral encephalitis. He testified he sees 10 to 15 cases a year of viral encephalitis that were misdiagnosed as abuse. He agreed that viral encephalitis is infrequent but said the absolute number of occurrences is

still high. He estimated a 65 or 70 percent likelihood that E.J. had an infection.

Dr. Gabaeff also noted that the child's head circumference at birth was in the 96.7th percentile and "way out of proportion" to the child's length, suggesting perinatal or intranatal damage to the head, which can lead to swelling in the brain. The records indicated E.J. left the hospital with a respiratory rate of 50 breaths per minute, when normal is closer to 30 breaths per minute. He believed the high respiratory rate could be a symptom of perinatal subdural hemorrhage occurring at birth. He agreed that there were no reported complications at birth, but said any complications would have been omitted from the record due to liability concerns. He noted that E.J. was in the hospital for four days after his birth, which is an abnormally long time, and yet the records mention no complications.

Dr. Gabaeff testified E.J. did not display symptoms of a child who had been abusively shaken. A child who had been abusively shaken would exhibit neck injury. In fact, the neck would be damaged at about one-tenth the force needed to cause brain hemorrhage. His review of the medical records indicated E.J. had no neck injuries.

When asked about the source of his opinion that neck injury would result from one-tenth the force needed to cause brain hemorrhage, Dr. Gabaeff pointed to two studies involving re-creations of traffic accidents. Using dummies, the studies' authors measured the amount of force needed to cause whiplash and brain hemorrhage in adults and

children. When asked whether he agreed with the studies' statement that "one-month-old infants have very compliant necks with little muscle tone and control of head movement," Dr. Gabaeff said, "Yes and No. I think we've all been around one-month-old babies. They can pick their head up, they have limited control. It's not like they have no control." He also pointed to a video showing a baby being shaken "five times hard" and yet had no retinal hemorrhage.

Dr. Gabaeff testified "shaken baby" syndrome was "concocted" in 1975 and never proven true. He believed 90 to 98 percent of those who deny having inflicted child abuse are innocent. He said, "There's only one or two experienced criminals who try to play the system, go to court, drag their attorney in when they know they're going to lose and hope that a technicality will spare them."

DCFS called Dr. Imagawa as a rebuttal expert witness. She testified she reviewed E.J.'s birth records, which describe his delivery was "uncomplicated." She also testified that a respiratory rate of 50 is a normal newborn respiratory rate. Dr. Imagawa believed E.J.'s laboratory results did not support the existence of a viral infection. Upon admission to the hospital, his white blood count was normal for his age. Although it dipped down a bit, that change could have been caused by the anti-convulsant administered to him. She also reviewed E.J.'s MRI with CHLA's pediatric neuroradiologist, and they found no evidence of any viral insult to the brain.

According to Dr. Imagawa, E.J.'s MRI revealed evidence of an acute subdural hemorrhage as well an older

subdural hemorrhage, suggesting there were two bleeds. The acute bleed likely happened within seven days of the MRI. The older bleed looked to be at least two weeks old, but it could also be older.

Dr. Imagawa agreed with Dr. Gabaeff that retinal hemorrhages could result from increase in intracranial pressure, but testified that those hemorrhages tend to be located in the posterior pole and rarely extend out to the retina's periphery. E.J. had extensive retinal hemorrhages, extending out to the periphery and in all four quadrants. According to Dr. Imagawa, that is more indicative of a child who had been vigorously shaken. She also testified that short falls do not cause retinal hemorrhages.

On cross-examination, she took issue with Dr. Gabaeff's opinion that neck injury would necessarily accompany shaking vigorous enough to cause brain hemorrhage. She testified that one to two percent of children who are shaken do have neck injuries. She also noted that studies have shown that MRIs do not always pick up the presence of injuries.

Dr. Imagawa agreed that E.J.'s head circumference at birth was in the 96th to 97th percentile while his length was in the 62th percentile, but she pointed out E.J.'s weight was in the 88th percentile. That meant E.J. was short but heavy, so the larger head was not, in fact, out of proportion with his size. She testified that a child born via C-section typically remains in the hospital for three or four days if there are no complications.

Mother's counsel asked Dr. Imagawa whether a maternal history of herpes would affect her opinion. Dr. Imagawa responded that a child can develop herpes if the mother has the condition, but if so, evidence would be seen in the postnatal period. In addition, an MRI would reveal specific findings for herpes encephalitis, which were not present in E.J.'s MRI.

When asked on cross-examination, Dr. Imagawa testified that a short fall of under four feet will result in subdural hemorrhage about one percent of the time. However, if the child had been swinging and fell from that height, it would more likely cause a subdural hemorrhage. In that case, however, some external sign of trauma is likely, whether a bump on the head or some other indication of hitting a surface. Dr. Imagawa's expert opinion was that E.J. had abusive head trauma consistent with vigorous and violent shaking.

The juvenile court then recessed for lunch and ordered the parties back at 1:30 p.m. When it called the case at 1:50 p.m., mother was not present. The court heard some other cases and called the matter again at 2:04 p.m. Again, mother was not present. Her attorney asked for a continuance so mother could testify. When the court asked mother's counsel for an offer of proof as to mother's intended testimony, counsel responded, "[s]he would testify that she has -- she was diagnosed with herpes in 2009." The court followed up with counsel asking if mother's testimony would

include anything else, and counsel responded "No[.]" The court denied the continuance request.

After hearing argument from counsel, the juvenile court dismissed the section 300, subdivision (b)(2) count alleging father's substance abuse, and sustained all other counts, including one count under section 300, subdivision (e)(1), alleging severe physical abuse of a child under age five. It concluded DCFS had sustained its burden not only under the preponderance of the evidence standard applicable at jurisdictional hearings, but also under a clear and convincing evidence standard applicable to disposition findings.

The juvenile court found "compelling evidence that the injuries sustained by the child [E.J.] was the result of non-accidental trauma. In other words, physical abuse by the parents while in the care of both of his parents." It found that none of the explanations proffered by the parents, such as a fall from a baby carrier or a seizure, is consistent with the nature and extent of the trauma that E.J. sustained. The court believed Dr. Imagawa's report was "very persuasive evidence" that E.J.'s injuries were the result of child abuse. It gave "very little weight to the testimony of Dr. Gabaeff," finding it "confusing, contradictory at times, sometimes evasive, sometimes vague, and overall not at all credible." Finally, the court stated, "even accepting as true mother's testimony that she has been diagnosed with herpes since 2009, and even had mother testified to that, the court finds persuasive Dr. Imagawa's opinion that that would not

change her overall opinion that this was the result of non-accidental trauma by the parent."

The juvenile court confirmed that DCFS intended to ask the court to deny reunification services under section 361.5, subdivision (b)(5), as it had recommended in the April 24, 2018 jurisdiction/disposition report. The court then continued the matter for a contested dispositional hearing. At that point, mother's counsel informed the court she had heard from mother's sister, who said mother did not come back to court because she had a seizure during the lunch recess.

H. Dispositional Hearing

The contested dispositional hearing was held on February 27, 2019. Mother testified that she tries to visit E.J. every weekend for at least an hour each time. She also calls him three or four times a week. She admitted she was 20 to 30 minutes late to E.J.'s birthday party and explained it was because she had to take the bus and it was raining. Mother testified she has attended the last four of E.J.'s medical appointments. When asked about E.J.'s medical issues, she said E.J. has been cleared from neurology so now the only concern is his leg, for which he goes to physical therapy.

Mother testified that she took a parenting and anger management class online. She did not know how long the class was, but it took her about two weeks to complete it. She said she would take in-person parenting classes if the

court ordered it. When asked what she learned in parenting classes, she responded, "I learned about like setting boundaries and like different ways, like -- how you can do different things so that the baby's brain forms the right connections and like how your child is able to trust you, and I learned about unconditional love and how to communicate better."

On cross-examination, she denied visiting E.J. only "sporadically." She also denied she visited only three or four times during the first three months of the case. When asked whether she had ever fallen asleep with E.J. on her lap during visits, she said, "No." Father, who was not testifying, interjected and said, "It was me." Mother acknowledged she did not attend all of E.J.'s medical appointments, but denied ever telling the social worker it was because she was not a morning person. When asked why she had missed appointments, she said foster mother schedules the appointments without consulting her, and sometimes she already has other plans, including her own doctor's appointments. She testified she went to individual counseling once a week for a couple of months, through a program for victims of trafficking. She began the program sometime after the section 300 petition was filed because it was ordered by the criminal court.

Father testified he visits E.J. "[a]s much as they let me." He estimated he has seen E.J. three times a month for anywhere from one to three hours each time. In total, he must have visited 50 or 60 times. When told foster mother

said father has only visited once since July 2017, father said, "That's a lie." During visits, they eat and play. When asked if E.J. recognizes who he is, father said, "Of course he knows who I am." Counsel asked, "How do know that?" Father replied, "Because he knows who I am." When asked whether father had fallen asleep with E.J. on his chest, father said it was E.J. who fell asleep on father's chest.

Father admitted he has attended only one of E.J.'s doctor's appointments. He said he did not go to the other appointments "[p]robably because [he] didn't know [about them] ahead of time." Father also acknowledged he has not enrolled in any courses, but said he would do so if the court ordered it. When asked why he had not done any counseling, he said it was because he is a workaholic.

On cross-examination, father said he and mother were no longer a couple. When told the investigator said she was at father's home three weeks ago and mother was there, he said the investigator was "a liar" and said he was not there. He said he saw the investigator only once and it was at DCFS's office.

After the witnesses were excused, minor's counsel urged the court to deny reunification services under section 361.5, subdivision (b)(5). Father's counsel then informed the court that it could not make a decision that day because pursuant to *In re Rebekah R.* (1994) 27 Cal.App.4th 1638, DCFS had a statutory obligation to advise the court whether reunification was likely to be successful and whether the lack of such services would be detrimental to the child.

After recessing to review the case, the juvenile court found DCFS had fulfilled its statutory obligation to investigate and advise the court as to the likelihood that reunification services would be successful. It added that the matter had been pending for almost 11 months and no party had raised good cause for a continuance. Mother and father's counsel then urged the court to grant reunification services. DCFS joined in minor's counsel's request that reunification services be denied.

The juvenile court stated it had "heard no competent testimony that services are likely to prevent re-abuse or continued negligent [*sic*] of the child." It noted mother testified "in very general terms" about topics raised in her online parenting class. That testimony did not persuade the court that further services would prevent reabuse. The juvenile court did not find credible "at all" the parents' testimony that they visited every weekend. It believed the statements in the reports were "far more credible" and demonstrated the parents' visits had been sporadic. The court also faulted the parents' lack of regular attendance at medical appointments given the child's severe physical injuries, some of which could lead to permanent, lifelong damage. It noted father himself admitted he was "rough" with his children and that mother had failed to reunify with two other children. The court found it "quite clear" that failure to attempt reunification would not be detrimental to E.J., given his lack of close and positive attachment to the parents. The court concluded, "[T]his is a very young child,

he was detained at a very young age, and given the parents' sporadic visits, the fact that father is not enrolled in predispositional services. As to mother, the fact that she has chosen to do on-line courses and nothing more than that, citing that the court does not find persuasive her statement that attending a group session is not possible due to her anxiety. [¶] I think these are all excuses, and in the court's view 361.5(c)(3) squarely applies in this case, and the court will order no reunification services in this matter."

Mother and father each filed petitions for extraordinary writ on May 6, 2019. We issued an order to show cause and now grant the petition in part.

III.
DISCUSSION

A. Mother's Request for Continuance

Mother contends the juvenile court violated her due process rights by refusing to continue the jurisdictional hearing to allow her to testify.

"'[A] parent in a juvenile dependency proceeding has a due process right to a meaningful hearing with the opportunity to present evidence . . . .' [Citation.]" (*In re Tamika T.* (2002) 97 Cal.App.4th 1114, 1122.) However, "'[p]rocedural due process is not absolute' . . . [citation]" (*In re Vanessa M.* (2006) 138 Cal.App.4th 1121, 1129), but instead "'*requires a balance*.' . . . [Citation.]" (*In re Tamika T.*, *supra*, 92 Cal.App.4th at p. 1122). "'*The state's strong*

interest in prompt and efficient trials permits the nonarbitrary exclusion of evidence [*citation*], *such as when the presentation of the evidence will "necessitate undue consumption of time*." [Citation.] The due process right to present evidence is limited to relevant evidence of significant probative value to the issue before the court. [Citations].' [Citation.]" (*In re Tamika T.*, *supra*, 97 Cal.App.4th at p. 1122.)

To ensure the court's limited resources are properly allocated, a juvenile court may require an offer of proof from a parent before permitting the parent to testify. (*In re Tamika T.*, *supra*, 97 Cal.App.4th at p. 1122.) Where a parent is denied an opportunity to testify or present evidence in violation of the parent's due process rights, reversal is required unless the error was harmless beyond a reasonable doubt. (*In re Ray M.* (2016) 6 Cal.App.5th 1038, 1052; *In re Mark A.* (2007) 156 Cal.App.4th 1124, 1146.)

In this case, mother was present for the first half of the jurisdictional hearing, when Drs. Gabaeff and Imagawa testified. When the court called the case after the lunch recess, however, mother was no longer in the courtroom and her counsel could not reach her by telephone. In response to counsel's request for a continuance so mother could testify, the trial court asked for an offer of proof. Counsel said mother would testify she had been diagnosed with herpes in 2009. We agree with mother that this testimony would have been relevant because Dr. Gabaeff had testified E.J.'s

injuries could have been caused by an infection, and that the most common cause of viral encephalitis is herpes.

However, any due process violation was harmless beyond a reasonable doubt. Dr. Imagawa testified that a maternal history of herpes would not change her opinion that E.J.'s injuries resulted from vigorous and violent shaking. Had E.J. acquired herpes through mother, Dr. Imagawa continued, there would have been evidence of it in the postnatal period as well as specific findings on E.J.'s MRI that were not present. The juvenile court credited Dr. Imagawa's testimony in general, and on this point in particular. By contrast, the juvenile court gave "very little weight" to Dr. Gabaeff's testimony, finding it "confusing, contradictory at times, sometimes evasive, sometimes vague, and overall not at all credible." In other words, even if mother had credibly testified to her herpes diagnosis, there is still no reasonable likelihood the trial court would have found E.J. had a herpes infection or that E.J.'s injuries were likely caused by a herpes infection and not by child abuse.

Mother counters that counsel's offer of proof did not necessarily encompass the totality of her intended testimony, although the record reflects that the court specifically asked if mother intended to address other issues, and counsel stated "no."

Regardless, mother fails to explain how her testimony on any other point would have altered the outcome of the jurisdictional proceedings. In any event, the "[f]ailure to make an adequate offer of proof precludes consideration of

the alleged error on appeal." (*In re Mark C.* (1992) 7 Cal.App.4th 433, 444.)

B. DCFS's Statutory Obligations

"Reunification services need not be provided to a parent . . . when the court finds, by clear and convincing evidence, . . . [¶] [t]hat the child was brought within the jurisdiction of the court under subdivision (e) of Section 300 [severe physical abuse of a child under age five] because of the conduct of that parent . . . ." (§ 361.5, subd. (b)(5).) In such cases, "the court shall not order reunification . . . unless it finds that, based on competent testimony, those services are likely to prevent reabuse or continued neglect of the child or that failure to try reunification will be detrimental to the child because the child is closely and positively attached to that parent. The social worker shall investigate the circumstances leading to the removal of the child and advise the court whether there are circumstances that indicate that reunification is likely to be successful or unsuccessful and whether failure to order reunification is likely to be detrimental to the child." (§ 361.5, subd. (c)(3).) In other words, once a court finds by clear and convincing evidence that a child falls under section 300, subdivision (e), "the general rule favoring reunification services no longer applies; it is replaced by a legislative assumption that offering services would be an unwise use of governmental resources." (*Raymond C. v. Superior Court* (1997) 55 Cal.App.4th 159, 164 (*Raymond C.*).) If the court chooses to

offer services nonetheless, it must find that services are likely to prevent reabuse of the child, and that finding is reviewed for substantial evidence. (*Ibid.*) DCFS must investigate and advise the court as to the prognosis for successful reunification, but it has no duty to prove that services will be unsuccessful. (*Ibid.*)

Citing *In re Rebekah R.* (1994) 27 Cal.App.4th 1638 (*Rebekah R.*), mother and father argue the juvenile court's order pursuant to section 361.5, subdivision (c) must be reversed because DCFS did not investigate and advise the court as to whether reunification services would likely be successful. In *Rebekah R.*, a two-month-old girl presented with multiple broken bones and bruises. (*Id.* at p. 1642.) The parents denied knowing about the injuries or how they happened. (*Id.* at pp. 1642–1643.) The mother was convicted and sentenced to a four-year prison term for child abuse while father was convicted and sentenced to six months in jail for misdemeanor child endangerment. (*Id.* at pp. 1644–1645.) The Tulare Department of Public Social Services (department) recommended no reunification services be provided due to (1) the nature and extent of the child's injuries, (2) the parents' inability to provide reasonable explanations for the injuries, (3) the parents' inability or unwillingness to protect the child from severe physical abuse, and (4) the parents' incarceration. (*Id.* at p. 1653.) The juvenile court adopted the recommendation and ordered no reunification services, finding that such services would not be in the best interest of the child and

citing section 361.5, subdivision (b)(6). (*Id.* at pp. 1643–1644.) The appellate court noted that section 361.5, subdivision (b)(6) and the "best interest of the child" standard applied to sexual abuse, and there was no sexual abuse alleged in the case. (*Id.* at pp. 1651–1652.) Rather, it read into the juvenile court's order an implied finding under section 361.5, subdivision (c), and affirmed the order as to mother, whose counsel had acknowledged there was no real possibility of reunification between the child and mother, given the length of mother's prison term. (*Id.* at p. 1649.) It reversed the order as to father, however. It noted a child's injuries are part and parcel of every section 300, subdivision (e) case, and that father would be released from jail in less than three months. (*Id.* at pp. 1653–1654.) It found that the parents' inability to explain the child's injuries "does not compel a conclusion one way or the other concerning the likely success of reunification services. At best, it goes to issues involving the father's credibility with respect to the circumstances which led to [the child's] removal." (*Id.* at p. 1653.) The juvenile court also stated father should have been aware of the child's injuries and believed he was not aware of them because he lacked insight into mother, her capabilities, and her serious, emotional dysfunctions. (*Id.* at pp. 1654–1655.) The appellate court found nothing in the record to support a finding that father was incapable of gaining the necessary insight through reunification services, and concluded the department had not fulfilled its statutory obligation to investigate and advise the court as to whether

father was capable of such insight with the proper services. (*Id.* at p. 1656.)

We are not persuaded that *Rebekah R.* requires reversal of the juvenile court's order in this case. DCFS's jurisdiction/disposition report and last minute information updates contain substantial evidence to support its assessment that reunification services are unlikely to succeed. DCFS reported that mother had failed to reunify with two children in the past, and that father was found to have physically abused an older child and also had a conviction for inflicting corporal injury on a spouse/cohabitant. The department provided an assessment by the MAT team, which noted barriers to successful reunification, including parents' denial about what happened to E.J. and their lack of responsibility for their actions. In last minute information updates, DCFS informed the court that parents had not attended any of E.J.'s medical appointments, visited E.J. only sporadically, and had even fallen asleep with E.J. on their laps when they did visit. The MAT team had noted that parents needed to address their personal issues, as they were interfering with the parents' ability to be fully available to E.J.

Yet, in the 11 months since E.J.'s detention, mother had enrolled in one 2-week long online parenting course, but was unable to explain in any specific way what she had learned from the course. Although mother told a social worker she could not go to in-person classes due to her anxiety, she later testified in court that she would attend in-

person classes if the court ordered it. Father never enrolled in any classes at all, despite his admission that he had anger issues and his statement that he knew he needed classes. Unlike the record in *Rebekah R.*, this record does not leave an "evidentiary vacuum" requiring the juvenile court to speculate as to the likely success of reunification services. (See *Rebekah R.*, *supra*, 27 Cal.App.4th at p. 1656.) Mother's failure to reunify with two older children, father's child welfare and domestic violence history, their continued denial of any responsibility for E.J.'s injuries, their sporadic visits with E.J., their indifference to his medical appointments, and their demonstrated lack of effort and interest in counseling and parenting courses constitute substantial evidence supporting the juvenile court's determination that reunification services are unlikely to be successful. (See *In re A.M.* (2013) 217 Cal.App.4th 1067, 1077 ["there are no services that will prevent reabuse by a parent who refuses to acknowledge the abuse in the first place"].) We conclude DCFS fulfilled its statutory obligation to investigate and advise under section 361.5, subdivision (c).

C. ICWA

The ICWA "protect[s] the best interests of Indian children and . . . promote[s] the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of

Indian culture . . . ." (25 U.S.C. § 1902.) "'Indian child' means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." (25 U.S.C. § 1903(4).)

"When a court 'knows or has reason to know that an Indian child is involved' in a juvenile dependency proceeding, a duty arises under ICWA to give the Indian child's tribe notice of the pending proceedings and its right to intervene. [Citations.] Alternatively, if there is insufficient reason to believe a child is an Indian child, notice need not be given. [Citations.]" (*In re Shane G.* (2008) 166 Cal.App.4th 1532, 1538.)

Father submitted form ICWA-020 indicating he may have Cherokee ancestry and providing the names of three individuals who may have additional information. DCFS unsuccessfully tried to call one of the three individuals on two occasions. There is no record of any attempt to contact the other two individuals. Nor does it appear the juvenile court made findings pursuant to ICWA.

DCFS and minor's counsel concede the matter should be remanded to the juvenile court for more perfect compliance with ICWA's notice provisions. We agree. (See *In re Gabriel G.* (2012) 206 Cal.App.4th 1160, 1167 [the father's claim of Indian heritage on the ICWA-020 form triggered the social services agency's duty to engage in further inquiry]; *In re Desiree F.* (2003) 83 Cal.App.4th 460,

471 ["The Indian status of the child need not be certain to invoke the notice requirement"].)

IV.
DISPOSITION

The petitions for extraordinary writ are granted in part and the juvenile court's order is conditionally reversed. The juvenile court shall ensure DCFS completes its investigation regarding father's alleged Native American ancestry and make appropriate findings pursuant to ICWA. If a tribe later determines that E.J. is an Indian child, "the tribe, a parent, or [the child] may petition the court to invalidate an action of placement in foster care or termination of parental rights 'upon a showing that such action violated any provision of sections [1911, 1912, and 1913].' (25 U.S.C. § 1914.)" (*In re Damian C.* (2009) 178 Cal.App.4th 192, 200.) Otherwise, the juvenile court's original order denying reunification services and setting the matter for a section 366.26 hearing remains in effect.

MOOR, J.

We concur:

BAKER, Acting P. J. KIM, J.